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No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL, *Petitioner*,

v.

OFFICE OF PERSONNEL MANAGEMENT

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF FOR THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES AS *AMICUS CURIAE*

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QUESTION PRESENTED

Whether 5 U.S.C. § 8347(c) precludes judicial review of all decisions of the Office of Personnel Management with respect to its determination of questions of disability and dependency, including its determination of regulatory, statutory and constitutional questions.*

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*NARFE presented a second question raised by the decision below in its amicus brief in support of the petition for a writ of certiorari: whether the Federal Courts Improvement Act vests exclusive jurisdiction in the United States Court of Appeals for the Federal Circuit to review Civil Service retirement matters under 5 U.S.C. § 7703. The Federal Circuit has recently answered this question in the affirmative, *see Bonagura v. Office of Personnel Management*, No. 83-1349 (Fed. Cir. July 26, 1984), and thus its resolution in this Court is not called for at this time.

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BRIEF FOR THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES AS *AMICUS CURIAE*

The National Association of Retired Federal Employees ("NARFE") submits this brief *amicus curiae* to urge that the Court reverse the decision below and resolve the important questions raised by that decision relating to the Civil Service Retirement Act and the Civil Service Reform Act of 1978.

I. INTEREST OF NARFE

NARFE is a nonprofit, incorporated association having its principal place of business in Washington, D.C. From its original fourteen charter members, NARFE has grown to a membership now approaching half a million federal annuitants (retirees and survivors) living throughout the 50 states, Puerto Rico, the Canal Zone, the Republic of the Philippines, and various foreign countries. The national membership is organized in more than 1600 local chapters and 50 state federations. NARFE has been a major advocate in maintaining the in-

tegrity of the federal government's civilian retirement systems and has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades. Moreover, when significant legal issues concerning the retirement system have been raised by administrative or judicial action, NARFE has participated in, or itself initiated, litigation for the common good of its members.

This case, because it raises fundamental questions about the character and legal status of the annuity rights earned through federal employment and the role of the courts in enforcing those rights, directly implicates paramount interests of NARFE. It is for this reason that NARFE sought and obtained the permission of the parties to participate before this Court as *amicus curiae*.

II. SUMMARY OF ARGUMENT

The issue presented to this Court is whether 5 U.S.C. § 8347(c) (1982), which states that decisions of the Office of Personnel Management ("OPM") with respect to its determination of questions of disability are "final and conclusive and are not subject to review," wholly bars judicial review of all aspects of OPM decisions concerning disability retirement matters, or, as the lower courts have uniformly held, merely prohibits judicial inquiry into the medical facts of particular disability determinations. The court below, contrary to over twenty years of precedent of its predecessor court and other courts,[1] held that § 8347(c) operated to foreclose judicial review. *Lindahl* v. *Office of Personnel Management*, 718 F.2d 391 (Fed Cir. 1983). This holding is erroneous.

Foremost, the court below erred in both misapplying and ignoring well-established canons of statutory construction to interpret § 8347(c) to preclude judicial review. First, the

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[1] *See, e.g., Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936 (1962); *Scroggins* v. *United States*, 397 F.2d 295 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968); *Matricciana* v. *Hampton*, 416 F.Supp. 288 (D. Md. 1976); *Polos* v. *United States*, 621 F.2d 385 (Ct. Cl. 1980).

legislative history of § 8347(c), from its enactment in 1946 and particularly its amendment in 1980, reveals that Congress intended only to constrict the standard of judicial review, precluding reviewing courts from inquiring into the *factual* determinations of medical disability. More important here than what the legislative history reveals, however, is what it does not reveal, and what it does not reveal is clear and convincing evidence of a Congressional purpose to foreclose judicial review. Second, the court below failed to give proper deference to the long-standing administrative constructions of § 8347(c) by the agencies charged with its implementation, OPM and the Merit Systems Protection Board ("MSPB"). These agencies, consonant with the settled judicial construction of § 8347(c), determined that only the medical determinations of disability were precluded from review. Finally, the court below failed to heed the admonition of this Court to resolve statutory questions whenever possible without raising constitutional conflicts. The construction of § 8347(c) adopted by the court below raises a question of substantial constitutional proportion: whether Congress properly can preclude judicial review of administrative determinations affecting property rights protected by the Fifth Amendment. Since it can hardly be said that the construction adopted by the court below was unambiguously mandated, it is evident that the court below erred in adopting a construction forcing the resolution of this constitutional issue.

III. ARGUMENT

A. There Is No "Clear And Convincing" Evidence Of Congressional Intent To Bar Access To Judicial Review

This court has repeatedly held that a statute will not be construed to bar access to judicial review unless Congress clearly and convincingly manifests such an intent. *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). The starting point for construing a statute must be the language of the statute itself. *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 541 (1978). However, because there is a strong presumption favoring judicial

review of federal administrative action, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the interpretation of a statute affecting the availability of judicial review can never end without inquiry beyond the words of the statute. *See, e.g., United States* v. *Erika, Inc.*, 456 U.S. 201, (1982); *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981). Inquiry beyond the literal words of the statute is especially appropriate where, as here, the statutory language lends itself equally well to two different constructions.[2] Yet even if the "plain language" of the statute were susceptible only to the construction adopted by the court below, the existence of compelling evidence of contrary congressional intent and the skepticism with which attempts to preclude review must be viewed constitute "rare and exceptional circumstances" mandating inquiry beyond the words of the statute. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 187 n.33 (1978).

Because the plurality of the court below was unable to "conceive of a more clear-cut statement of congressional intent" than that provided in the statute itself and thus ended its analysis with the language of the statute,[3] it ignored other significant and substantial indicia of congressional intent. Examination of the indicia which the court below ignored reveals not only that there is no clear and convincing evidence that Congress intended to preclude judicial review of disability retirement matters, but further that Congress intended to provide limited judicial review to all disability retirement applicants.

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[2] While the court below read § 8347(c) to preclude judicial review, the language on its face can as plausibly be read as precluding review only of factual questions of disability and dependency. The statute provides that OPM "shall determine questions of disability and dependency," its "decisions concerning these matters" being "final and conclusive" and "not subject to review." According finality to OPM's determination of "questions of disability" is not the same, however, as according finality to its determination of law and procedure. This reading is even more compelling when the controlling precodification language is examined. *See infra* at 5-6.

[3] "No legislative history existed in relation to [the finality clause], and none is needed in view of its continued unambiguous nature." 718 F.2d at 393.

1. Background

The Civil Service Retirement Act, Pub.L. No. 66-215, 41 Stat. 614 (1920) ("Retirement Act") was adopted to provide retirement security for career civil servants. From its inception, the Retirement Act provided disability annuities for career employees who became disabled, for medical reasons, from providing continued service. *See* Retirement Act § 5, 41 Stat. 616 (1920). In 1948, the Retirement Act was amended to incorporate a finality provision limiting judicial review of survivorship and disability benefits determinations. *See* Pub.L. No. 80-426 § 12(d)(3), 62 Stat. 56 (1948). As originally enacted, the finality provision read:

> Questions of dependency and disability arising under this section shall be determined by the Civil Service Commission and its decisions *with respect to such matters* shall be final and conclusive and shall not be subject to review. The Commission may order or direct at any time such medical or other examinations as it shall deem necessary *to determine the facts* relative to the nature and degree of disability . . .

Id., emphasis added. With the codification of Title 5 in 1966, however, this language was changed into its present form:

> The Commission shall determine questions of disability and dependency arising under this subchapter. The decisions of the Commission *concerning these matters* are final and conclusive and are not subject to review. The Commission may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability . . .

Pub.L. No. 89-554 § 8347(c), 80 Stat. 378 (1966), emphasis added.[4] Finally, the codified version was itself substantially amended in 1980. *See* Pub.L. No. 96-500, 94 Stat. 2696 (1980).[5]

While there is scant legislative history surrounding the enactment of the finality clause, much is known about the context in which Congress was legislating in 1948, particularly with respect to judicial review of administrative action. Specifically, in 1946 Congress passed the Administrative Procedure Act, Pub.L. No. 79-404, 60 Stat. 237 (1946) ("APA"), to provide, *inter alia*, for judicial review of administrative action:

> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action . . ., shall be entitled to judicial review thereof.

Id. at § 10(a), 60 Stat. 243. Aggrieved disability retirement applicants ostensibly therefore, at least between 1946 and 1948, were entitled to judicial review of Commission decisions under the APA.[6]

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[4] As noted above, § 8347(c) can easily be read to preclude review only of the factual determinations of medical disability. *See* fn. 2, *supra*. The original language, however, is even more susceptible to this construction, as the object of the finality clause was the Commission's "decisions with respect to" its determination of "questions of dependency and disability." Additionally, the specific reference in the next sentence to the Commission's procedures "to determine the facts" of disability reinforces the inference that the language reaches only to factual determinations. Indeed it would take a strained construction to carry the finality language of the original enactment beyond factual determinations of disability and dependency. Since Congress directed in its enactment of Title 5 into law that "there are no substantive changes made by this bill," S. Rep. No. 1380, 89th Cong., 2d Sess., at 20-21 (1966), the court below properly should have focused its inquiry on the precodification version of the finality language. *See Muniz* v. *Hoffman*, 422 U.S. 454, 470 (1975).

[5] The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) also amended § 8347 by adding a new paragraph (d) providing for MSPB review of OPM decisions. This amendment represented merely a codification of then existing Civil Service Commission regulations. *See* 5 C.F.R. § 831.1205 (1978).

[6] While the APA did not create jurisdiction to hear disability retirement matters, jurisdiction was made available by the Tucker Act, 24 Stat. 505 (1887), now codified in pertinent part at 28 U.S.C. §§ 1346, 1491 (1982). Thus

Because of the importance of the Act, Congress also specified that it would be immune from implicit revision:

> No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.

Id., at § 12, 60 Stat. 244. Neither the 1948 amendment imposing the finality language nor any other amendment "expressly" provided for a modification or superseding of the judicial review provisions of the APA. Since the 1948 amendment could not "supersede or modify" the provisions of the APA without expressly so stating, it could not have affected individuals' rights to judicial review in disability cases. *See Benton* v. *United States*, 488 F.2d 1017, 1024 (Ct. Cl. 1973); *cf.*, *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 (1955).

It is axiomatic that repeals by implication are disfavored and that conflicting statutes must be construed whenever possible "to give effect to each . . . while preserving their sense and purpose." *Watt* v. *Alaska*, 451 U.S. at 267; *see, also, Administrator, Federal Aviation Admin.* v. *Robertson*, 422 U.S. 255, 265-266 (1975). Here, even if complete reconciliation of the two provisions is not possible, the least affront to the purposes of the APA is yielded by construing the finality language to reach only to factual conclusions. That the finality provision was adopted so shortly after the enactment of the APA is persuasive evidence that this was exactly Congress' intent.

Importantly, between 1956 and 1980, the finality provision of § 8347(c) was uniformly construed in precisely this fashion, to allow limited judicial review of Civil Service Commission decisions. The Court of Claims in 1962 articulated what is now referred to as the *Scroggins* standard for review of Civil Service Commission decisions on disability retirement matters,

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it was the various district courts, or the Court of Claims, which would have been the "court[s] of competent jurisdiction" "specified by statute" authorized to hear these claims. See *Califano* v. *Sanders*, 430 U.S. 99, 105 n. 6 (1977).

holding that it would set aside such administrative determinations

> where there has been a substantial departure from important procedural rights, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination.

Gaines v. *United States*, 158 Ct. Cl. 497, 502, *cert. denied*, 371 U.S. 936 (1962). The Court of Claims continuously applied this standard until it was merged into the Federal Circuit in 1982. *See, e.g., Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 353 U.S. 952 (1968); *Polos* v. *United States*, 621 F.2d 385 (Ct. Cl. 1980). Thus, at least until 1980, § 8347(c) was construed as limiting courts' ability to inquire into the medical facts of disability, but not precluding them from reviewing for misconstruction of governing law and regulation and like errors "going to the heart of the administrative determination."

2. The 1980 amendment

In 1980, Congress amended the finality language of § 8347(c) specifically to provide full judicial review for a small sub-class of disability retirement matters. *See* Pub.L. No. 96-500 (1980). During 1978 and 1979, the House held extensive hearings to examine perceived abuses by federal agencies of fitness-for-duty examinations. *See Use of Physical and Psychiatric Examinations to Determine Fitness for Duty: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. (1978); *RFEHB Plan, Survivor Benefit and Fitness-for-Duty Exams: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. (1979). Congress was concerned that agencies were employing fitness-for-duty exams and involuntary retirement procedures as disciplinary measures, thereby removing federal employees from employment without providing them the benefit of adverse action protections. Thus, to curb this abuse and to insure that all federal employees received their procedural entitlements,

the House proposed to amend § 8347 to provide that all decisions of OPM on retirement matters be subject to judicial review.[7] *See* H.R. 2510, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. H1003 (1979); H.R. Rep. No. 1080, 96th Cong., 2d Sess. (1980).

While the original House bill proposed to remove completely the limiting language of § 8347, the provision ultimately proposed by the House did not reach quite as far. Because OPM believed that full *de novo* review of all disability retirement cases would require excessive judicial involvement, it voiced its disapproval of the proposed H.R. 2510. Significantly, in urging the House to adopt a less expansive measure, OPM testified that full *de novo* review was unnecessary, as applicants already possessed limited appeal rights:

> [I]f there are questions of proper procedure or constitutional issues, these questions may be raised in the Federal court system. Only the question of disability itself, which is a question of medical fact, is actually barred from judicial review by section 8347(c).
>
> * * *
>
> The courts already may review questions of procedure as distinguished from questions of fact concerning disability itself, and employees are, therefore, not entirely precluded from obtaining judicial review.

RFEHB Plan, *supra*, at 4. Further, Alan K. Campbell, then Director of OPM, submitted to Congress:

> It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, misconstruction of the governing legislation, or

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[7] The House bill as originally proposed sought only to delete the phrase "and not subject to review" from § 8347(c). The House Report makes clear, however, that removal of this phrase was deemed sufficient to allow *de novo* review of these decisions. *See* H. R. Rep. No. 1080, 96th Cong., 1st Sess. 1 (1980); Staff of House Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., *Forced Retirement Physchiatric Fitness For Duty Exams* 20 (Comm. Print 1978).

> some like error going to the heart of the administrative determination.

H.R. Rep. No. 1080, *supra*, at 8.

Consequently, the House backed away from its complete *de novo* review proposal. Yet to avoid the "adverse effect" of the *Scroggins* limitation of review (*i.e.*, limiting review to statutory and procedural questions), H.R. Rep. 1080 *supra*, at 4, the House amended its proposal to provide *de novo* review only in agency-initiated psychiatric disability cases. Ultimately the House accepted the Senate version of the bill which provided for expanded judicial review of agency-initiated psychiatric disability cases under 5 U.S.C. § 7703. *See* S. Rep. No. 1004, 96th Cong., 2d Sess. (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 5986.

In sum, the pertinent legislative history of Pub.L. No. 96-500 persuasively demonstrates that in 1980 Congress did not intend to preclude all judicial review of disability retirement matters other than those initiated by agencies on involuntary psychiatric grounds. Rather, Congress became aware of agency abuse of fitness-for-duty exams and involuntary psychiatric disability procedures; it recognized that the procedural protection available to these individuals (*i.e.* judicial review under the *Scroggins* formula) was inadequate; it proposed initially to repeal the limiting language of § 8347; and, after considering OPM's concerns, ultimately adopted a provision broadening review rights for a certain sub-class of annuity applicants, while leaving the rights of others to be governed by the limited review afforded by *Scroggins*.

3. The intent of Congress

There are two competing constructions of § 8347 presented to this Court: 1) whether the limiting language precludes all judicial review of MSPB decisions on disability matters, as the Eighth Circuit and the court below have held; or 2) whether the limiting language merely prohibits courts on review from inquiring into the medical determination of disability, as

petitioner urges and several other courts have held.[8] All other things being equal, of course, the construction allowing judicial review but precluding inquiry into the medical facts of disability must be accepted, as there is a strong presumption favoring judicial review. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971).[9]

The Eighth Circuit, the first court to accept OPM's current argument that § 8347 totally precludes review,[10] found persuasive two sentences from the Senate Report:

> The purpose of H.R. 2510 as amended is to remove the ban to judicial review of certain disability retirement determinations made by the Office of Personnel Management . . .
>
> * * *
>
> H.R. 2510, as amended, will remove the current bar to judicial review of such disability retirement determinations . . .

Morgan v. *Office of Personnel Management*, 675 F.2d 196, 200 (8th Cir. 1982) *citing* S. Rep. No. 1004, *supra*, at 1-2.[11] Citing

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[8] *See, e.g., Turner* v. *Office of Personnel Management*, 707 F.2d 1499, 1506 (D.C. Cir. 1983); *Parodi* v. *Merit Systems Protection Board*, 702 F.2d 743, 747 (9th Cir. 1982); *McCard* v. *Merit Systems Protection Board*, 702 F.2d 978, 983 (11th Cir. 1983); *Pitzak* v. *Office of Personal Management*, 710 F.2d 1476, 1478 (10th Cir. 1983); *Lancellotti* v. *Office of Personnel Management*, 704 F.2d 91, 97 (3d Cir. 1983).

[9] While there is a plausible reason for precluding review of medical determinations of disability (*see* H. R. Rep. No. 1080, *supra*, at 3), significantly, at no point in the legislative history is there advanced a reason for disallowing review for procedural and statutory errors in disability cases. No reason is proffered for disallowing this review in these cases while leaving the gamut of other retirement matters fully reviewable, for no reason exists. Because "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible," *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982), the construction adopted by the court below is accordingly suspect to start.

[10] The government has been arguing unsuccessfully at least since 1978 that § 8347(c) precludes judicial review. *See Fancher* v. *United States*, 588 F.2d 803, 806 n. 3 (Ct. Cl. 1978).

[11] It is noteworthy that every portion of the legislative history cited in support of preclusion of judicial review is couched in terms of *removing* the

this language, and inferring from the explicit provision of review in agency-initiated psychiatric disability cases an implicit intent to deny review in all other cases, the Eighth Circuit found the "clear and convincing" intent necessary to defeat judicial review. *Morgan*, 675 F.2d at 199. To the contrary, however, this amendment and its legislative history provide clear and convincing evidence that Congress intended to limit review only of factual determinations and to expand review in agency-initiated psychiatric disability cases.

As a general rule, Congress is presumed to act with knowledge of the judicial constructions of its enactments and, without contrary expressed intent, it is presumed to accept those constructions. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975); *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 78-79 (1982). This is so because

> [i]t is always appropriate to assume that our elected representatives, like our citizens, know the law.

Cannon v. *University of Chicago*, 441 U.S. 677, 696 (1979). Thus, for example, the fact that Congress revisited § 8347(c) in its consideration and passage of the Civil Service Reform Act in 1978 and left unchanged this "finality" language is evidence that Congress knew of and accepted that section's judicial construction. *See Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977).[12]

With respect to the 1980 amendment of § 8347, however, it is not necesary to indulge this presumption. With its 1980 amendment, Congress addressed what it perceived to be the inappropriately narrow avenue of review available to certain annuity

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ban or bar to judicial review. Significantly, nowhere is there to be found, either in the 1980 legislative history or elsewhere, any language purporting to impose this "bar" or indicating that this language was intended to extend to all review and not just review of factual determinations.

[12] "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change [the judicial] construction of its legislation." *Id.* The same, of course, could be said of Congress' 1966 recodification of the retirement provisions *See* Pub. L. No. 89-554, 80 Stat. 378 (1966).

applicants.[13] Concerned with the "special and unusual restrictions on judicial examination" imposed by § 8347(c), and aware of the "adverse effect" of not allowing review "as if the finality clause were not there," H. R. Rep. 1080 *supra*, at 4, *quoting McFarland* v. *United States*, 517 F.2d 938, 942-43 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1049 (1976), Congress explicitly broadened the appeal rights of a certain sub-class of annuity applicants.

Notwithstanding that Congress could not reasonably be presumed to have intended silently to extinguish the rights of certain individuals while explicitly legislating to broaden the rights of others,[14] the fact that it specifically referred to the judicial construction of § 8347(c) is compelling evidence that it intended to adopt this construction. *Georgia* v. *United States*, 411 U.S. 526, 533 (1973); *Chemehuevi Tribe of Indians* v. *Federal Power Comm'n*, 429 U.S. 395, 410 (1975). Here Congress discussed in depth the judicial construction of § 8347(c); it indicated that this construction was inordinately restrictive and inadequate to protect the rights of a certain sub-class of individuals; and it legislated away that part of the construction it found unacceptable. A more clear-cut example of congressional approbation of a judicial construction is not easily found.

That Congress expressly ratified the *Scroggins* line of authority in its effort to expand judicial review in one area is

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[13] *See Forced Retirement Psychiatric Fitness for Duty Exams*, *supra* at 15.

[14] In his concurring opinion below, Judge Nichols concluded that Congress had doubly-locked the doors to judicial review, once explicitly in § 8347(c) and once implicitly by providing in § 8347(c) that review was unavilable "except to the extent provided under subsection (d) of this section." 718 F.2d 400, 403 (Nichols, J. concurring). The supposition that Congress intended to foreclose all judicial review with its amendment of subsection (c) is conclusively dispelled by the House Report itself. Specifically, the Report states that the new language was intended "to provide an exception to the general rule" of limited review, under which "the Federal courts presently review . . . cases if procedural or constitutional issues are involved." H. R. Rep. No. 1080 *supra* at 5-6. Plainly, Congress intended to open wider, not barricade, the doors to judicial review.

perhaps the most compelling evidence that it did not intend its 1980 amendment of § 8347 to preclude all judicial review and thereby invalidate *Scroggins*. *Georgia* v. *United States*, 411 U.S. at 533. At the very least, however, it casts doubt on the *Morgan* court's, and the Federal Circuit's determination that Congress intended to foreclose judicial review. Because the "right to judicial review of a final agency action will not be cut off" absent "a showing of 'clear and convincing evidence' " of legislative intent, *Abbott Laboratories*, 387 U.S. at 140-41, the existence of this uncertainty alone is sufficient to demonstrate the error of the court below. *See, also, Rusk* v. *Cort*, 369 U.S. 367, 379 (1962); *Dunlop* v. *Bachowski*, 421 U.S. at 567.

Rather than examine the legislative history for the "clear and convincing evidence" of Congressional intent necessary to support its decision, the plurality below instead ignored the "conflicting comments of a few congressmen"[15] and looked only "to what Congress did." 718 F.2d at 400. Yet in so doing, the plurality betrayed its error, for the existence of these "conflicting" congressional statements evinces the absence of "clear and convincing evidence" of congressional intent. Without clear and convincing evidence of congressional intent, judicial review can never be foreclosed.

The bottom line of the plurality's holding appears to be its determination that the Court of Claims decided *Gaines* and *Scroggins* incorrectly and thus by its 1980 amendment Congress could not properly adopt that Court's constructions: "What did not properly exist cannot be expanded." 718 F.2d at 399. The plurality correctly notes that in reenacting legislation Congress need not say "we meant what we said the first time," *id.*, but it ignores the fact that by both tacitly and expressly adopting the judicial construction allowing limited judicial review, Congress has effectively said "we meant what the courts

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[15] Characterizing the language concerning "removing the current bar" as conflicting statements of congressional intent is overstating the matter. The "current bar," as Congress was well aware, was the "special and unusual" limitation imposed by *Scroggins*. *See* H. R. Rep. No. 1080, *supra*, at 4; *see also* fn. 11 *supra*. It was not a complete bar to all review.

have been saying for the last twenty years."[16] That the plurality below would decide *Gaines* and *Scroggins* differently today is of academic interest at best; the resolution of the issues before this Court turns on the intent of Congress, not the hindsight of the Federal Circuit. The axioms this Court has provided for discerning that intent amply demonstrate that the plurality below erred in locking the courthouse doors to applicants for disability retirement.

B. The Administrative Agencies Charged With Implementing § 8347(c) Have Concluded That Review Is Available

In addition to misgauging congressional intent, the court below further erred in failing to accord proper deference to the administrative constructions of § 8347(c). This Court has repeatedly held that

> the construction of a statute by those charged with its administration is entitled to substantial deference.

United States v. *Rutherford*, 442 U.S. 544, 553 (1979). *See, also, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Rather than defer to these constructions or provide a reasoned basis for rejecting them, the plurality below simply ignored the long-standing interpretations of the agencies charged with administering § 8347(c). In so limiting its inquiry, the court below erred.

Until the passage of the Civil Service Reform Act in 1978, the Civil Service Commission was the only agency charged with administering § 8347(c). With the passage of the Reform Act, the Commission was disestablished, with its appeals jurisdiction being transferred to the newly created Merit Systems Protection Board and the remainder of its duties

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[16] As with an administrative construction of an act, once a judicial construction has been " 'fully brought to the attention of . . . Congress and [Congress] has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n. 10 (1979), *quoting Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 487-89 (1940).

transferring to OPM. Thus since 1978, both the MSPB and OPM-arguably have been "charged with administering" § 8347(c). Significantly, both agencies have interpreted § 8347(c) to allow limited judicial review, foreclosing only appellate review of factual determinations.

OPM's construction of § 8347(c) is found in the legislative history of the 1980 amendment. The Director of OPM submitted, both to the Senate and the House, letters stating OPM's views on the proposed amendments. In both letters, the Director stated:

> It is appropriate, therefore that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, misconstruction of the governing legislation, or some like error going to the heart of the administrative determination.

See S. Rep. No. 1004, *supra*, at 4-5; H. R. Rep. No. 1080 *supra*, at 8. Furthermore, in testimony before the House, OPM's Associate Director stated:

> Only the question of disability itself, which is a question of medical fact, is actually barred by section 8347(c).
>
> * * *
>
> The courts already may review questions of procedure as distinguished from questions of fact concerning the disability itself, and employees are therefore, not entirely precluded from obtaining judicial review.

RFEHB Plan, *supra* at 4.

To be sure, OPM took a vastly different position in the court below. The views expressed by its counsel in litigation, however, do not command the respect its contemporaneous explanation of the statute does. *Turner* v. *Office of Personnel Management*, 707 F.2d at 1504. As this Court has noted,

> Congress had delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the

> expertise that can enlighten and rationalize the search for the meaning and intent of Congress.

Investment Company Institute v. *Camp*, 401 U.S. 617, 628 (1971). Thus it cannot be disputed that OPM itself construed the limiting languge of § 8347(c) not as a preclusion of judicial review but only a limitation on the standard of review.

While such an administrative interpretation is ordinarily entitled "substantial deference," *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *Quern* v. *Mandley*, 436 U.S. 725, 738 (1978), here even greater weight is due:

> [W]e necessarily attach "great weight" to agency representations to Congress when the administrators "participated in drafting and directly made known their views to Congress in committee hearings."

United States v. *Vogel Fertilizer Co.*, 455 U.S. 15, 31 (1982), *quoting Zuber* v. *Allen*, 396 U.S. 168, 192 (1969). Here OPM voiced its interpretation of the meaning of § 8347(c) not only in committee hearings, but through its Director to both houses of Congress. Under these circumstances OPM's administrative interpretation is compelling.

Unlike OPM, MSPB has consistently maintained that judicial review is not precluded by § 8347(c). MSPB's position that judicial review is available stems from its determination that it adjudicates retirement matters, including disability retirement matters, under 5 U.S.C. § 7701. *See Hien* v. *Office of Personnel Management*, 1 MSPB 396 (1980); *Chavez* v. *Office of Personnel Management*, 6 MSPB 343 (1981). Under 5 U.S.C. § 7703(a)(1), a companion provision of § 7701,

> Any employee or applicant for employment adversely affected by an final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.[17]

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[17] While virtually all disability annuity applicants are former employees by the time their appeals reach the MSPB, it is clear that the reference to "any employee" in § 7703(a)(1) includes "former" employees. *See, e.g., Raichocich* v. *United States Postal Service*, 675 F.2d 417 (D.C. Cir. 1982) (involving

Thus MSPB has consistently advised unsuccessful disability retirement applicants of the "right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703." Petitioner's Appendix at 58a; *see, also, Turner* v. *Office of Personnel Management*, 707 F.2d at 1504.

MSPB's determination that judicial review lies under 5 U.S.C. § 7703, because it is the determination of an agency charged with administering the act, is due substantial deference. *United States* v. *Rutherford*, 442 U.S. at 553; *Udall* v. *Tallman*, 380 U.S. at 16. Yet even beyond this substantial deference,

> [p]articularly is respect due when the administrative practice at stake "involves a construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

Power Reactor Development Co. v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961), *quoting Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). From its inception the MSPB has determined that unsuccessful disability retirement applicants are entitled to judicial review. This determination should not be lightly dismissed.

C. The Court Below Erroneously Construed § 8347(c) To Raise Serious Constitutional Conflicts

A statute must be construed, whenever possible, to avoid raising serious constitutional questions. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion); *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 480, 507 (1978). Yet the construction of § 8347(c) adopted by the court below, abrogating as it does certain individuals' entitlement to seek redress in

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reemployment rights). In removal cases, which indisputably are covered by §§ 7701 and 7703, all appellants are "former" employees, for an appeal cannot be taken to the MSPB until *after* the effective date of the action. *See* 5 C.F.R. § 1201.22(b)(1984); *Bronger* v. *Office of Personnel Management*, No. 83-1349, slip op. at 10-11 (Fed. Cir. July 26, 1984).

Article III Courts, does raise such significant constitutional problems. Since it hardly can be said that the construction adopted by the court below was unambiguously mandated, and because another construction without constitutional implications was at least equally tenable, the court was required to reject the construction it adopted. By failing to adhere to this established jurisprudential principle, the court unnecessarily and improperly raised serious constitutional questions. By so doing, it erred.

The Federal Circuit summarily dismissed the constitutional problems raised by its statutory construction by characterizing disability annuities as "gratuities." 718 F.2d at 392. According to that court, the annuity was a mere gift that could be conditioned in any way Congress saw fit. *Id.* The court, however, plainly misconceived the nature of the interest at stake.

Congress intended civil service annuities as a form of deferred compensation. Representative Hammil, one of the active proponents of the original retirement act, stated:

> This pension bill must not be regarded as governmental generosity. Pensions are not gratuities and should not be considered as such. They should be looked upon as deferred wages—a payment of wages which were not disbursed at the time they were earned.

59 Cong. Rec. H6300 (1920). Furthermore, the pertinent statutory provision confirms that Congress conceived and established retirement benefits as deferred compensation:

> Each employee or Member is deemed to consent and agree to [deductions for contributions to the retirement fund] from basic pay. Notwithstanding any law or regulation affecting the pay of an employee or Member, payment less these deductions is a full and complete discharge and acquittance of all claims and demands for regular services during the period covered by the payment *except the right*

> *to the benefits to which the employee or Member is entitled under this subchapter.*

5 U.S.C. § 8334(b) (1982) (emphasis added)[18]

Considering that federal employees contribute to the retirement fund and are entitled to an annuity only after their interests vest, the entitlement to this deferred compensation is a property right, not a gratuity. *See Kizas* v. *Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983), *cert. denied* 104 S.Ct. 709 (1984); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 554 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1594 (1984). Of course, there is a significant constitutional question raised by foreclosing judicial review of the denial, or taking, of these rights, just as there would be if the government sought to deny a Federal employee the other earned entitlements of his or her position. *United States* v. *Larionoff*, 431 U.S. 864, 879 (1977). Indeed, as Justice Brennan recently noted,

> when Congress assigns [the adjudication of certain property rights] to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review.

Northern Pipe Line Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality opiniuon) *citing Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 445 n.13 (1977).

Again, the court below erred in forcing the resolution of this constitutional conflict when "a construction of the statute [was] fairly possible by which the question may [have been] avoided." *United States* v. *Clark*, 445 U.S. 23, 27 (1980). The court's action was especially anomalous because of this Court's recognition that the issue that the Federal Circuit unnecessarily raised is "one of the most confusing and controversial areas of constitutional law." *Northern Pipe Line Constr. Co.*, 458

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[18] This language derives from Section 9 of the original act and is in substance unchanged. *See* 41 Stat. 618.

U.S. at 93 (White, J. dissenting) *citing Glidden Co.* v. *Zdanok*, 370 U.S. at 534.

More specifically, the issue unnecessarily raised is whether the separation of powers doctrine prohibits Congress from delegating to an executive agency the power conclusively to determine questions of statutory entitlement when preexisting, constitutionally cognizable, property interests are at stake. In determining if the Constitution requires that judicial review of an administrative decision must be made available, it is the nature of the interest at stake which is controlling. *Northern Pipe Line Constr. Co.*, 458 U.S. at 69 n.23 *quoting Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1955).[19]

There are, of course, innumerable individual interests that are affected by governmental action. And, it is only at the extremes that the question of access to judicial review is easily answered. Thus, for example, when the determination of contractual rights is at stake, Art. III recourse must be available. *See Atlas Roofing Co., Inc.*, 430 U.S. at 450 n.7; *Crowell* v. *Benson*, 258 U.S. 22, 50-51 (1932). At the other extreme, when the interests at stake are those arising only out of the government interacting in its sovereign capacity with individuals, and where there are no independent property considerations present, the Constitution may not require that access to judicial review be made available. *See United States* v. *Erika, Inc.*, 456 U.S. 201 (1982).

The interest at stake here is a preexisting, constitutionally protected property interest. Indeed, what cannot be ignored is

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[19] The attempt to resolve these questions of review through characterization of the right involved as either "public" or "private" has proved to be of limited utility. *See Northern Pipe Line Constr. Co.*, 458 U.S. at 115 (White, J. dissenting) (suggesting that the distinction between private and public rights is inconsequential so long as Art. III appellate review is available to insure the proper separation of powers.) *See, also*, Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation Of Powers*, 97 Hav. L. Rev. 778 (1984) (suggesting that a balancing approach utilizing the criteria set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), would resolve the constitutional conflict.)

that the entitlement to a civil service annuity, and particularly a disability annuity, is an earned entitlement, in the nature of a contractual right to compensation. *See Kizas* v. *Webster*, 707 F.2d at 536; *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d at 554. The significance of the fact that we are here dealing with a form of compensation, and, therefore, a property right that cannot be extinguished without judicial review, has recently been explained by this Court in an analogous context:

> No one disputes that Congress may prospectively reduce the pay of [Federal employees], even if that reduction deprived [employees] of benefits they had expected to be able to earn. It is quite a different matter, however, for Congress to deprive [an employee] of pay due for services already performed, but still owing.

United States v. *Larionoff*, 431 U.S. at 879, citations omitted. Because retirement benefits represent payment for services rendered in the past, they are part and parcel of employees' constitutionally protected compensation. Disability annuities, in essence disability insurance, are also part of that deferred compensation; the assurance of a guaranteed income in the event of medical disability, an additional *quid pro quo* for contributing to the retirement fund for five years.

It may be that certain disputes "which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" need not be reviewable in Art. III courts. *Crowell* v. *Benson*, 285 U.S. at 50. Disputes concerning entitlement to earned retirement benefits, however, clearly are of a different order. Importantly, actions seeking entitlement to earned retirement benefits are not suits against the government "in its sovereign capacity." *Atlas Roofing Co.*, 430 U.S. at 450. Rather, such suits seek to enforce preexisting property rights affected, but not created, by statute, that arise as a result of the government acting in its proprietary capacity, as employer. As such, disputes of this nature are of the type traditionally subject to suits at common law or equity. *Cf.*, *Semaan* v. *Mumford*, 335 F.2d 704, 706 n.6

(D.C. Cir. 1964). It is well-established that access to Art. III review for cases of this sort must not be foreclosed. *Crowell* v. *Benson*, 285 U.S. at 50.

While an individual's entitlement to an annuity in a specific amount is dependent on the statutory scheme, his or her right to be paid for services rendered and the right to the "benefit of the bargain"[20] are independent rights commanding the full panoply of judicial protections. The court below failed to give proper effect to this fact by summarily dismissing the obvious constitutional problems that its construction of § 8347(c) created.

The foregoing demonstrates, at a minimum, that any construction of § 8347(c) that precludes all recourse to Art. III review raises very serious constitutional problems. Indeed, we believe that the constitutional infirmity of such a statutory scheme is clear from the authorities discussed above. This issue, however, need not and should not be definitively resolved.[21] For, again, once it had been shown that "a construction of the statute [was] fairly possible by which the question may [have been] avoided," *United States* v. *Clark*, 445 U.S. at 27, the court below was required to adopt it. This showing has easily been made here, and the Federal Circuit's foreclosure of review, notwithstanding that showing, was error. On this ground alone, reversal is required.

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[20] Federal employes who entered service before January 1, 1984 were, as a condition of employment, obligated to contribute to the retirement fund, deductions from their salary being mandatory under 5 U.S.C. § 8334(b). For their contribution to the retirement fund they earned the right to receive an annuity as prescribed by Congress at the time their interests vest. *See American Postal Workers Union*, 707 F.2d at 554.

[21] If the Court concludes that its decision here must turn on definitive resolution of the constitutional issues that are implicated—and it should not—fuller briefing of the questions is obviously in order. *See Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534, n.7 (1962).

IV. CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

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